Nos. 90-10 and 90-46 (3) (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

SAMUEL S. GRANITO, PETITIONER

v.

UNITED STATES OF AMERICA

GENNARO ANGIULO, FRANCESCO ANGIULO, DONATO ANGIULO, AND MICHELE ANGIULO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Granito's RICO convictions must be reversed because the court of appeals found that the evidence was insufficient to support one of the predicate acts of racketeering charged against him.

2. Whether the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague.

3. Whether the district court erred in refusing to order immunity for a prospective defense witness.

4. Whether the district court erred in declining to give a requested jury instruction distinguishing between the extortionate extension of credit charged against petitioners Gennaro, Francesco, and Donato Angiulo in one count and the extortionate extension of credit charged against a severed co-defendant in another count.

5. Whether the district court erred in declining to instruct the jury that it could find one overall gambling business instead of the five separate gambling businesses charged in the indictment.

6. Whether the district court erred in declining to give the voice identification instruction requested by petitioners.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-109a) is reported at 897 F.2d 1169.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1990, Petitions for rehearing were denied on March 26, 1990. The petitions for a writ of certiorari were filed on June 25, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner Gennaro Angiulo was convicted on one count of participating in an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 2); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 1); four counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 (Counts 3, 4, 5, 7); two counts of conspiring to make an extortionate extension of credit, in violation of 18 U.S.C. 892(a) (Counts 12 and 13); one count each of conspiring to collect and collecting an extortionate extension of credit, in violation of 18 U.S.C. 894(a) (Counts 14 and 15, respectively); one count of obstructing justice, in violation of 18 U.S.C. 1503 (Count 18); and one count of conspiring to commit that offense, in violation of 18 U.S.C. 371 (Count 19). Petitioner Francesco Angiulo was convicted on Counts 1 through 5, 7, and 12 through 14; petitioner Donato Angiulo was convicted on Counts 1, 2, 3, and 12; petitioner Granito was convicted on Counts 1, 2, and 4; and petitioner Michele Angiulo was convicted on Count 3.

Gennaro Angiulo was sentenced to a total of 45 years' imprisonment and $120,000 in fines; Francesco Angiulo was sentenced to 25 years' imprisonment and $60,000 in fines; Donato Angiulo was sentenced to 20 years' imprisonment and $40,000 in fines; Granito was sentenced to 20 years' imprisonment and $35,000 in fines; and Michele Angiulo was sentenced to three years' imprisonment and a fine of $5,000. The district court also ordered the forfeiture of various assets. The court of appeals reversed two parts of the forfeiture order but affirmed in all other respects. Pet. App. 1a-109a.

1. The evidence at trial showed that all five petitioners were members of the Patriarca Family of La Cosa Nostra.

Gennaro Angiulo was the underboss of the organization, in charge of its day-to-day operations. Immediately beneath him in the command hierarchy were Samuel Granito and Donato Angiulo, who were "Capo Regimes" (captains). Beneath the Capo Regimes, the organization consisted of soldiers and then of associates. Francesco Angiulo was a soldier and also served as the accountant for the organization's gambling and loansharking businesses. Michele Angiulo was an associate. Pet. App. 3a-4a.

In various combinations, petitioners participated in four illegal gambling operations. The first involved the operation by Gennaro and Francesco Angiulo of a series of "Las Vegas Nights" gambling events from approximately late 1978 to mid-1981. The events were a type of bazaar, ostensibly operated to benefit nonprofit, charitable organizations. In fact, however, the proceeds were not given to charitable organizations, but were kept by their La Cosa Nostra operators. Pet. App. 4a.

The second gambling business involved the operation, during 1980 and 1981, of twice-weekly barbooth games at the Demosthenes Democratic Social Club in Lowell, Massachusetts. Barbooth is a dice game in which, typically, 12 or more players place bets on whether the shooter of the dice will roll a winning or losing combination of numbers. The house takes a percentage of the amount bet. Gennaro Angiulo was the overseer of the operation, and Francesco Angiulo was the accountant. Pet. App. 5a.

The third gambling business was an extensive, illegal numbers-betting operation in the Boston area. Approximately 180 people were involved in the operation, including agents who collected the bets, "sub-books" who controlled the agents and paid the winning bettors, and office managers who supervised the day-to-day operation of the business and settled accounts with the sub-books. Gen-

naro Angiulo was the principal owner and overall boss of the operation. Francesco Angiulo was the day-to-day supervisor. Donato Angiulo controlled a number of sub-book operations and was responsible for collecting money. Michele Angiulo stood in for Francesco and also assisted in controlling several of the sub-book operations. Pet. App. 5a.

The final gambling business involved high-stakes poker games in which Gennaro Angiulo and Granito had a financial interest. Gennaro Angiulo was the overall boss of the operation, and Francesco Angiulo served as the accountant. Pet. App. 6a.

In addition to their gambling operations, Gennaro, Donato, and Francesco Angiulo engaged in loansharking. For example, in 1981 Donald Smoot, a regular player in the poker games, owed Donato Angiulo $14,000 at an interest rate of two and a half percent per week. Joseph Palladino owed the Angiulos $200,000, paid interest at the rate of one percent per week, and eventually satisfied the debt by transferring real estate to the Angiulos. Pet. App. 6a-7a.

Petitioners also engaged in a series of conspiracies to obstruct justice and commit murder. During the 1950s and 1960s, Edward, William, and Walter Bennett were loansharks and bookmakers who came into conflict with Gennaro Angiulo and codefendant Ilario Zannino. In January 1967, Edward Bennett disappeared; in April 1967, Walter Bennett likewise disappeared; and in December 1967, William Bennett was shot to death. In an intercepted conversation in 1981, Gennaro Angiulo and Zannino recounted how Zannino, with the help of an accomplice, killed the Bennetts at Gennaro's direction. Gov't C.A. Br. 28-29.

In 1976, Gennaro Angiulo had his associates kill Joseph Barboza, who had testified against Gennaro and other members of his organization in several prosecutions. Gov't

C.A. Br. 29-30. In early 1981, Gennaro conspired with others to kill Walter LaFreniere in order to prevent him from testifying before a federal grand jury about the Angiulo organization. Also in early 1981, Gennaro Angiulo and Granito engaged with others in a conspiracy to kill Angelo Patrizzi, who they believed was planning to kill two members of the Patriarca Family as revenge for the 1978 murder of Patrizzi's half-brother. In June 1981, Patrizzi's decomposed body was found in the trunk of a stolen car. Pet. App. 7a-8a.

2. The court of appeals affirmed the convictions. Petitioners contended, first, that their RICO convictions had to be reversed because the "pattern of racketeering activity" element of the RICO statute is unconstitutionally vague. In rejecting that claim, the court concluded that, whatever doubts there may be about the "precise reach of the statute in marginal fact situations not currently before [the court]," there could be no doubt on the part of a person of ordinary intelligence that petitioners' conduct was proscribed, because "the murder conspiracies and the gambling and loansharking operations for which the defendants were charged and convicted here are precisely the type of activity that Congress intended to reach through RICO." Pet. App. 12a-13a. The court also held that the predicate acts charged against petitioner Granito, all of which were carried out to further the aims of the same RICO enterprise (the Patriarca Family), clearly constituted a "pattern" within the meaning of the RICO statute. *Id.* at 15a.

Second, the court rejected the Angiulos' contention that the district court erred in refusing to order immunity for prospective defense witness Joseph Palladino. The court expressed "substantial reservations" about the notion that judges have inherent power to grant defense-witness immunity. In any event, however, the court concluded that a

grant of immunity to Palladino would not have been appropriate because the government had "significant" reasons for withholding immunity: to protect possible future federal and state prosecutions of Palladino for engaging in organized criminal activities. Pet. App. 43a. The court also found no government misconduct with respect to Palladino of a sort that might warrant a court order requiring the government to grant Palladino statutory immunity. *Id.* at 43a-47a.

Third, although the court found the evidence insufficient to support one of the predicate acts of racketeering charged against Granito (being an accessory to the Patrizzi murder), the court upheld Granito's RICO convictions on the ground that the jury necessarily found him guilty of conspiring to kill Patrizzi and participating in the poker game operation, the other two predicate acts alleged against him. Pet. App. 54a-65a.

Next, the court upheld the district court's refusal to instruct the jury that the testimony of an FBI agent, who had identified petitioners' voices in tape-recorded conversations, must be "received with caution and scrutinized with care." The court of appeals explained that the general jury instructions, when considered in the context of the charge as a whole, adequately covered the issues raised by the requested voice-identification instruction, and that the district court's failure to give the instruction did not impair petitioners' ability to present their voice-identification defense. Pet. App. 80a-81a.

Fifth, petitioners contended that the district court should have instructed the jury that it could find that petitioners' various gambling operations constituted only a single overall gambling business, rather than five separate gambling businesses, as charged in the indictment. The court of appeals found "little or no evidentiary grounds to warrant instructing the jury on the 'one business only' theory." Pet. App. 84a.

Finally, the court rejected the Angiulos' contention that the jury instruction on Count 12 (which charged Gennaro, Francesco, and Donato Angiulo with making an extortionate loan of $14,000 to Donald Smoot), failed adequately to differentiate the Angiulos' loan from a distinct $14,000 loan to Smoot made by Zannino (which was initially charged in Count 11 and later deleted from the indictment when Zannino was severed from the trial). The court concluded that the instructions, as given, were "sufficiently clear to eliminate any likelihood that the jury would confuse the Zannino loan (count 11) with the Angiulo loan (count 12)." Pet. App. 89a.[1]

ARGUMENT

1. Petitioner Granito challenges (Pet. 16-26) the court of appeals' affirmance of his RICO convictions after the court found the evidence insufficient to support one of the predicate acts charged against him. Contending that the jury may have improperly relied on the invalid predicate act in convicting him, petitioner claims that this case falls within the rule that when the jury is instructed that it may convict on one of several grounds, and one of those grounds is later determined to be insufficient, the conviction must be reversed if the reviewing court is not certain that the jury's verdict rested on a valid ground. See *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931) (reversing when "so far as the record discloses" the conviction may have rested on an invalid ground); *Yates* v.

[1] Petitioners also unsuccessfully challenged the impartiality of the jury, Pet. App. 15a-32a, a variety of evidentiary and procedural rulings, *id.* at 32a-39a, 47a-53a, the sufficiency of the evidence on certain counts, *id.* at 65a-67a, and certain other aspects of the jury charge, *id.* at 67a-77a, 85a-87a, 89a-91a. Petitioners do not renew those claims in this Court.

United States, 354 U.S. 298, 312 (1957); *Street* v. *New York*, 394 U.S. 576, 585-588 (1969); see generally *Zant* v. *Stephens*, 462 U.S. 862, 880-884 (1983).

The court of appeals acknowledged the general rule on which petitioner relies. But the court correctly concluded that that rule is not controlling when "uncertainty as to the ground upon which the jury relied can be eliminated," such as "where a verdict based on any ground would mean that the jury found every element necessary to support a conviction on the sufficient ground." Pet. App. 63a-64a, quoting *United States* v. *Ochs*, 842 F.2d 515, 520 (1st Cir. 1988). Applying those principles, the court concluded that the jury here necessarily found that petitioner committed the two predicate acts charged in the indictment that were sufficiently supported by the evidence.[2]

Granito was charged with three predicate acts under RICO: gambling; being an accessory to the Patrizzi murder; and conspiring to murder Patrizzi. The predicate act of gambling was also charged as a separate substantive crime. The court first noted that the jury's conviction of Granito on the gambling count removed all doubt that the jury also found him guilty on the corresponding predicate act of gambling. Pet. App. 62a. See *Brennan* v. *United States*, 867 F.2d 111, 114 (2d Cir.) (guilty verdicts on separately charged crimes paralleling the RICO predicate acts

[2] Although the court of appeals did not have to reach the issue, there is reason to doubt that the *Street-Stromberg-Yates* analysis applies in a case such as this, where the evidence as to one of the predicate acts is factually insufficient but the charge is not legally defective. In these circumstances, it is reasonable to assume that the jury acted rationally in convicting on the basis of the predicate acts that were supported by the evidence and not on the basis of the predicate act that was not sufficiently proved. In that respect, this case is quite different from *Street*, *Stromberg*, and *Yates*, where the jury could rationally have relied on an impermissible theory, not having any basis for knowing that it was legally defective.

"operated like special verdicts" showing the jury's finding of guilt on the predicate acts), cert. denied, 109 S. Ct. 1750 (1989); *United States* v. *Kragness*, 830 F.2d 842, 861 (8th Cir. 1987), cert. denied, 109 S. Ct. 2086 (1989); *United States* v. *Anderson*, 809 F.2d 1281, 1284-1285 (7th Cir. 1987); *United States* v. *Lopez*, 803 F.2d 969, 976-977 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987); *United States* v. *Pepe*, 747 F.2d 632, 688 (11th Cir. 1984); *United States* v. *Peacock*, 654 F.2d 339, 348 (1981), modified, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983).

The court also reasoned that because a RICO "pattern" requires "at least two acts of racketeering activity," 18 U.S.C. 1961(5), the jury also must have found Granito guilty of conspiring to murder Patrizzi, being an accessory to his murder, or both. Pet. App. 62a. If the jury found Granito guilty of conspiracy, the court observed, his RICO convictions would of course be valid; the evidence sufficiently established conspiracy. But the court rejected Granito's surmise that "the jury may have found him guilty on accessory, but not on conspiracy." *Id.* at 64a. Although the court found the evidence insufficient in one respect to support the accessory charge,[3] the court ex-

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[3] There was no doubt about the sufficiency of the evidence to establish Granito's role in the murder. In a tape-recorded conversation, Granito described a murder attempt on Patrizzi, stating: "We had [Patrizzi] ready last Friday. Oh, we had him Friday cause he said 'c'mon we'll go for coffee.' We had a place. We're gonna take him in a house and strangle him . . . ." Gov't C.A. Br. 32; see also *id.* at 33 (describing Granito's agreement to procure a telephone number that could be used to identify Patrizzi's whereabouts in order to murder him). The source of doubt with respect to the accessory charge was whether Frederick Simone was a principal in that murder. Pet. App. 55a-60a. The court recited ample evidence that Granito planned the murder and engaged in attempts to commit it, *id.* at 58a, but concluded that "[w]hether Simone participated in the actual murder is wholly unclear from the evidence," *id.* at 60a.

plained that if the jurors found Granito guilty of being an accessory to Patrizzi's murder, they necessarily must have found him guilty on the charge of conspiring to kill Patrizzi, thus supplying the second valid predicate act.

> If the jury convicted Granito as an accessory, by finding that [Frederick] Simone was a principal in the Patrizzi murder and that Granito had incited, procured, counseled, hired and commanded Simone to commit the murder, they must necessarily have accepted the government's interpretation of the pertinent tape-recorded conversations involving Simone, Granito, Gennaro Angiulo, and Zannino. These same conversations, and virtually the same government interpretation, were at the heart of the conspiracy charge against Granito, which alleged that Granito had conspired with Zannino, Simone, and Gennaro Angiulo to kill Patrizzi.

Pet. App. 64a-65a. The court thus concluded that "[b]ecause the facts and the elements underlying the two charges were so intertwined, if the jury found Granito guilty as an accessory, they must also have found him guilty of conspiracy." [4] *Id.* at 65a.

The court of appeals' affirmance of Granito's RICO convictions, after its determination that the jury necessarily found the requisite predicate acts, is fully consistent with the analysis employed in similar settings by other courts of appeals. See *United States* v. *Corona*, 885 F.2d

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[4] Granito argues (Pet. 24) that it would not necessarily be inconsistent, in a particular case, for a jury to convict a defendant of being an accessory to a crime and to acquit him of conspiring to commit the crime. But the court of appeals understood the different elements of the two crimes, Pet. App. 62a n.16; it simply concluded, on the facts of this case, that a rational jury could not have found Granito guilty of being an accessory without finding every element required to convict him of conspiracy.

766, 775 (11th Cir. 1989) (allegations on invalid mail fraud counts and valid Travel Act counts "were so intertwined that jury could not reasonably have found that [the defendant] performed the mail fraud but not the Travel Act conduct"), cert. denied, 110 S. Ct. 1838 (1990); *Callanan* v. *United States*, 881 F.2d 229, 234-235 (6th Cir. 1989) (co-defendant's conviction on RICO charges based on bribery established that the jury found that defendant committed valid bribery predicates; therefore, invalid mail fraud predicate acts did not require reversal), cert. denied, 110 S. Ct. 1816 (1990); *United States* v. *Zauber*, 857 F.2d 137, 151-154 (3d Cir. 1988) (instruction required jury to find kickbacks; hence, submission of invalid predicate acts of mail fraud did not require reversal of RICO charge), cert. denied, 109 S. Ct. 1340 (1989).

Contrary to Granito's contention (Pet. 18), there is no conflict among the courts of appeals over the proper disposition of RICO convictions when one predicate act is found invalid. In the cases cited by Granito, the courts reversed RICO convictions only after finding that it was unclear whether the jury had found two valid predicate acts. The court of appeals noted those holdings, Pet. App. 63a, but properly found them inapplicable in a case like this one. See *United States* v. *Walgren*, 885 F.2d 1417, 1426 (9th Cir. 1989) (court could not conclude that mail fraud conviction on "intangible rights" theory constituted a jury finding that defendant was guilty of a state bribery offense not charged in the indictment); *United States* v. *Mandel*, 862 F.2d 1067, 1074 (4th Cir. 1988) (RICO conviction vacated because "we may not know whether the [intangible rights] mail fraud or the bribery charges * * *, or both, were considered by the jury"), cert. denied, 109 S. Ct. 3190 (1989); *United States* v. *Holzer*, 840 F.2d 1343, 1350-1352 (7th Cir.) (recognizing that a RICO conviction must be upheld even when one predicate act is invalid if a

rational jury necessarily found sufficient predicate acts, but finding that principle inapplicable on a particular record), cert. denied, 109 S. Ct. 315 (1988); *United States* v. *Kragness*, 830 F.2d at 861 ("we cannot know from the jury's general verdict of guilty which acts it found [the defendant] had committed"); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.) (invalid predicate act had no relationship to other predicate acts charged), cert. denied, 469 U.S. 831 (1984).[5]

2. Petitioners contend (90-10 Pet. 26-29; 90-46 Pet. 49-55) that the "pattern of racketeering activity" element of a RICO offense is unconstitutionally vague. They rely on the concurring opinion in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2906-2909 (1989), in which Justice Scalia, joined by three other Justices, ex-

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[5] Granito also relies (Pet. 18) on *United States* v. *Brown*, 583 F.2d 659, 669-670 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), in which the court, pursuant to a government concession, reversed the defendant's RICO conviction following the invalidation of two predicate mail fraud violations. Based on a conflict between *Brown* and cases from other circuits, Justices White and Brennan would have granted certiorari in *McCullough* v. *United States*, cert. denied, 484 U.S. 947 (1987). But the Third Circuit subsequently narrowed *Brown*, explaining that the RICO conviction there had to be reversed because "it was impossible to determine whether the jury had relied on invalid predicate acts." *United States* v. *Zauber*, 857 F.2d at 154. In *Zauber* itself, the Third Circuit joined other courts of appeals in holding that a reviewing court must consider whether the record discloses that the jury necessarily relied on a valid ground for its verdict. In light of *Zauber*, the conflict noted in *McCullough* has disappeared. See *Brennan* v. *United States*, 867 F.2d at 116 (discussing *Brown* and *Zauber* and concluding that "there appears to be no conflict with respect to" the disposition of RICO convictions where one predicate is found invalid); *United States* v. *Holzer*, 840 F.2d at 1351 (finding no conflict because of the court's prediction that the Third Circuit would adopt the rule later embraced in *Zauber*).

pressed doubts about whether the RICO "pattern" element could withstand a constitutional vagueness challenge.[6]

Absent First Amendment considerations, a defendant may not challenge a statute for vagueness on the ground that there is some uncertainty regarding the full reach of the statute in marginal cases not before the court. Rather, the defendant must show that the statute is vague as applied to the particular conduct with which he is charged. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & n.7 (1982); *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). To sustain such a vagueness attack, the defendant must show that the stattute fails to give a person of ordinary intelligence reasonable notice that his conduct is forbidden. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Connally* v. *General Construction Co.*,

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[6] In *H.J. Inc.*, this Court clarified that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." 109 S. Ct. at 2900. Prior to *H.J. Inc.*, the courts of appeals had uniformly held that the RICO statute is not unconstitutionally vague. See *United States* v. *Tripp*, 782 F.2d 38, 41-42 (6th Cir. 1986); *United States* v. *Ruggiero*, 726 F.2d 913, 923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Martino*, 648 F.2d 367, 381 (5th Cir. 1981), cert. denied. 456 U.S. 943 (1982); *United States* v. *Uni Oil, Inc.*, 646 F.2d 9346, 949-953 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982); *United States* v. *Morelli*, 643 F.2d 402, 412 (6th Cir.), cert. denied, 453 U.S. 912 (1981); *United States* v. *Aleman*, 609 F.2d 298, 305 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Huber*, 603 F.2d 387, 393 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Hawes*, 529 F.2d 472, 478-479 (5th Cir. 1976); *United States* v. *Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

269 U.S. 385, 391 (1926). In this case, the court of appeals correctly concluded that petitioners "have not even come close to making this showing[.]" Pet. App. 13a.[7]

Congress drafted the RICO statute to cover a wide range of criminal activity, but "[o]rganized crime was without a doubt Congress' major target[.]" *H.J. Inc.*, 109 S. Ct. at 2904. See also *United States* v. *Turkette*, 452 U.S. 576, 588-593 (1981). Given RICO's central purpose of combatting organized crime, persons of reasonable intelligence have ample notice that the statute reaches the commission of repeated criminal acts—such as murder, gambling, and loansharking—that are aimed at furthering the goals of a La Cosa Nostra family. As the court of appeals concluded, "[a] person of ordinary intelligence could not help but realize that illegal activities of an organized crime family fall within the ambit of RICO's pattern of racketeering activity." Pet. App. 13a. In rejecting a similar vagueness challenge, the Third Circuit recently reached the same conclusion, stating: "[T]he application of RICO to the activities of the Scarfo crime family could not have come as a surprise to the members of the family. In fact, we have doubts that a successful vagueness challenge to RICO ever could be raised by defendants in an organized crime case." *United States* v. *Pungitore*, No. 89-1371 (3d Cir. Aug. 1, 1990), slip op. 27.

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[7] The Court has noted "the more important aspect of the vagueness doctrine 'is not actual notice, but * * * the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). Petitioners, who are associated with precisely the type of organized crime family that RICO was principally designed to attack, do not suggest that the RICO statute failed to give the government sufficient guidelines to use in determining whether to prosecute them for racketeering violations.

Petitioner Donato Angiulo and Granito further claim (90-46 Pet. 54; 90-10 Pet. 28-29) that they lacked fair notice that their varied criminal acts satisfied the "relatedness" aspect of RICO's pattern requirement. See *H.J. Inc.*, 109 S. Ct. at 2900-2901. That contention is without merit. In enacting RICO, Congress recognized that organized criminals engage in "diversified" activities such as "syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation." 18 U.S.C. 1961 note (Congressional Statement of Findings and Purpose). Accordingly, courts have uniformly held that the requisite relatedness of predicate acts is established when each act benefits or furthers the goals of the same criminal enterprise. See, *e.g.*, *United States* v. *Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir. 1980) ("the enterprise itself supplies a significant unifying link between the various predicate acts"). Since the predicate acts committed by petitioners advanced the cause of a single organized crime family, there can be no serious contention that petitioners lacked notice that they were subject to RICO liability for their conduct.

3. The Angiulos next contend (Pet. 33-35) that the district court erred in denying a motion to grant immunity for a prospective defense witness, Joseph Palladino.[8] Peti-

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[8] At trial, the defense stated that it wished to call Palladino, one of the Angiulos' loansharking victims, to testify that he was not a loansharking victim at all, but rather a party to a legitimate business transaction with the Angiulos. After unsuccessfully moving to restrict the government's cross-examination of Palladino to his alleged status as a loansharking victim, the defense moved for immunity for Palladino, claiming that, absent immunity, Palladino would assert his Fifth Amendment privilege and refuse to testify. The district court denied the motion, and Palladino did not testify. Pet. App. 39a.

titioners urge that immunity should have been granted on one of two theories: first the district court should have granted Palladino immunity because his testimony was essential for an effective defense; second, the district court should have ordered the government to grant statutory immunity to Palladino to prevent the government from deliberately distorting the fact-finding process. The court of appeals properly rejected both arguments. Because the court assumed the validity of the underlying theories but found their requirements not satisfied in this case, the court's decision does not conflict with any decision of any other court of appeals.

a. In our view, the district court did not have authority to immunize Palladino absent a request from the government. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to seek immunity in the Executive Branch, not the Judiciary. In discussing the immunity statutes, this Court has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). Strong separation-of-powers concerns counsel against the assertion of judicial power to make immunity decisions for the government. Not surprisingly, the great majority of the courts of appeals have held that judges may not immunize defense witnesses without a request from the prosecution.[9]

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[9] See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Mattheson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077

The Third Circuit alone has held that immunity may be granted on the court's initiative, where it is necessary to protect the defendant's efforts to mount his defense. That court has narrowly limited the scope of that rule, however:

> [I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity.

Government of the Virgin Islands v. *Smith*, 615 F.2d 964, 972 (1980). Even assuming that Palladino's testimony could be characterized as essential and exculpatory, the defense was not entitled to immunity for Palladino under the *Smith* approach. As the court of appeals explained, "[u]nlike in *Smith*, the government here *has* presented a number of significant reasons for withholding immunity." Pet. App. 43a. The government indicated that granting Palladino immunity would impede possible future prosecutions of Palladino for involvement in organized crime activities, for tax violations, and for violations of state law. *Ibid.* Indeed, the government advised the court that at that very moment, Palladino was the subject of an IRS investigation arising from business and real estate transactions related to the charges in that case. Gov't C.A. Br. 101. The court of appeals correctly concluded that "[t]hese reasons certainly are adequate to constitute a strong governmental interest in withholding immunity." Pet. App. 43a. There is no reason to believe the Third Circuit

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(1981); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976). See also *United States* v. *Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990).

would have decided the question differently. See *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (upholding denial of defense witness immunity in part because government "may yet" prosecute witness for whom immunity was sought).

b. Nor was statutory immunity for Palladino required in order to prevent deliberate distortion of the fact-finding process. The courts that have addressed that theory have held that district courts may compel the government to immunize defense witnesses in only two circumstances: where government intimidation provokes a defense witness into invoking his Fifth Amendment privilege, thereby withholding testimony that otherwise would have been available to the defense, or where the government withholds immunity from a defense witness for the purpose of keeping exculpatory evidence from the jury. See, *e.g.*, *United States* v. *Pinto*, 850 F.2d 927, 932 (2d Cir.), cert. denied, 109 S. Ct. 174 (1988); *United States* v. *Hooks*, 848 F.2d 785, 799 (7th Cir. 1988); *United States* v. *Lord*, 711 F.2d 887, 891 (9th Cir. 1983). In the court of appeals, petitioners argued that the government intimidated Palladino by (1) informing the court that it thought Palladino would lie if he testified; (2) transmitting pertinent information on Palladino to the IRS; (3) reciting to the court the criminal activities of which it suspected Palladino; and (4) notifying Palladino, through the IRS, that he was under investigation for possible tax violations. As the court of appeals correctly concluded, however, "[n]one of this conduct is sufficient to warrant a finding of witness intimidation by the prosecution." Pet. App. 45a.

First, the government's statements that it thought Palladino would testify falsely and its enumeration of his suspected crimes were not calculated to intimidate him; those statements were directed not to Palladino but to the court. The government properly made those statements in

order to explain why it had declined to grant Palladino statutory immunity. Second, there was nothing improper about the prosecution's transmission of information to the IRS; investigative arms of the government frequently share information in which they have a mutual interest. Finally, the prosecution did not suggest to the IRS that it contact Palladino, nor does the record show the prosecution was even aware the IRS would do so. As the court of appeals observed, the defense "ha[s] not pointed to any direct communication between the prosecution and Palladino," or "established the requisite nexus between the government's conduct and Palladino's decision not to testify." Pet. App. 46a. Compare *United States* v. *Morrison*, 535 F.2d 223 (3d Cir. 1976) (intimidation found where prosecution repeatedly warned prospective witness that she was liable to prosecution on drug charges, that if she testified her testimony could be used against her, and that federal prejury charges could be brought if she lied).

Nor is there any basis for believing that the prosecution declined to grant Palladino immunity for the purpose of keeping exculpatory testimony from the jury. As previously discussed, the government provided valid reasons for its objection to immunizing Palladino, including his suspected involvement in other criminal activities and the government's desire not to hinder possible state and federal prosecutions. The court of appeals explained that "[t]hese reasons clearly show that the government's conduct was motivated by something other than the sole desire to keep Palladino's exclupatory testimony from the jury." Pet. App. 47a.

4. Petitioners contend (90-46 Pet. 36-43) that the district court erred in failing to give a jury instruction distinguishing between two extortionate loans that were made to the same victim. Count 11 of the initial indictment charged co-defendant Zannino with making an extortionate $14,000

loan to Donald Smoot. Count 12 of the indictment charged petitioners Gennaro, Francesco, and Donato Angiulo with making a separate extortionate loan to Smoot, also in the amount of $14,000. Shortly after opening statements, Zannino's trial was severed from that of petitioners, and Count 11 was deleted from the indictment. Petitioners' defense to Count 12 was that only one $14,000 loan was made to Smoot, and that it was made by Zannino, acting alone. Petitioners argue that the district court committed reversible error by refusing to give a requested jury instruction informing the jury that Count 12 did not relate to the Zannino loan. Pet. App. 88a.

As the court of appeals correctly concluded, "[a]lthough the court did not give the precise instruction requested by [petitioners], the careful instructions that were given more than adequately covered the situation." Pet. App. 89a. The district court explicitly instructed the jury that Counts 7 through 11 had been deleted from the indictment as a result of Zannino's severence. Furthermore, the court read Count 12 to the jury and reviewed each of the elements of the charge. In so doing, the court explicitly named Gennaro, Francesco, and Donato Angiulo as the defendants who were charged with the loan. Finally, the redacted indictment together with written copies of the entire charge were provided to the jury. *Ibid.* In light of these circumstances—and the fact that Smoot's testimony and the opening and closing arguments clearly reflected the separateness of the two loans (see Gov't C.A. Br. 103-104)—petitioners' proposed instruction was not necessary to prevent jury confusion about the subject matter of Count 12.

5. The Angiulos contend (Pet. 43-46) that the district court committed reversible error in failing to give an instruction permitting the jury to decide how many gambling businesses petitioners operated. The indictment charged, both as predicate acts of racketeering in the

RICO counts and as separate substantive offenses, that petitioners engaged in five distinct gambling businesses. Petitioners asked for an instruction that the jury could find that these operations formed only one overall gambling business.

The district court properly declined to give the "one business only" instruction, because the evidence did not support it. A trial court is required to give an instruction on the theory of the defense "only if the evidence provides some foundation for it." *United States* v. *Durrani*, 835 F.2d 410, 419-420 (2d Cir. 1987); *United States* v. *Tarantino*, 846 F.2d 1384, 1400 (D.C. Cir.), cert. denied, 109 S. Ct. 174 (1988); *United States* v. *Westbrook*, 896 F.2d 330, 337 (8th Cir. 1990). The government introduced evidence at trial showing that petitioners' gambling businesses, each of which involved a different type of gambling, were conducted over different time periods, held in different locations, and operated by different managers and personnel. Pet. App. 84a. Petitioners point to nothing in the record indicating that their gambling operations constituted one business. Indeed, as the court of appeals noted, the "paucity of * * * references [to the theory at trial] undercuts any argument that the issue was of such importance that the failure specifically to instruct on it seriously impaired a given defense." *Ibid.*[10]

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[10] Contrary to petitioners' apparent contention (90-46 Pet. 43-44) nothing in *Sanabria* v. *United States*, 437 U.S. 54 (1978), suggests that a defendant is always entitled to a "one business only" instruction. The Court in *Sanabria* noted only that under 18 U.S.C. 1955, participation in a single gambling business is but a single offense, 437 U.S. at 70-71; the opinion does not require that the issue be put to the jury where the uncontradicted evidence shows multiple gambling businesses. Nor are petitioners correct in contending (90-46 Pet. 46) that the result here conflicts with the decisions in *United States* v. *Escobar De Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984), and *United States* v. *Duncan*, 850

6. Finally, the Angiulos contend (Pet. 47-49) that the district court erred in refusing to give specific instructions regarding voice-identification testimony. The government's evidence at trial consisted in considerable part of tape-recorded conversations obtained through court-authorized electronic surveillance. An FBI agent testified about how the recordings were acquired, and he identified petitioners' voices on the tapes. At the close of the evidence, the defense asked the district court to instruct the jury that the agent's testimony about the voice identifications must be "received with caution and scrutinized with care," and that "[t]he government's burden of proof extends to every element of each crime charged, including the burden of proving beyond a reasonable doubt the identity of an alleged perpetrator of an offense." Pet. App. 78a.

Although the district court declined to give the specific instruction requested by petitioners, the requested instruction was substantially covered by the court's charge. The court gave a general instruction on witness credibility, informing the jury that it must determine the credibility of each witness's testimony. The court also instructed the jury that the written transcripts of the tape recordings introduced by the government had no independent evidentiary value and were to be used only to help the jury discern the words on the tapes. Finally, the court repeatedly emphasized in its charge the government's burden of proof as to each element of the crimes charged. As the court of appeals observed, "[t]hese instructions put the jurors on notice that they were to listen to the tapes themselves and reach their own determinations, and not blindly base their

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F.2d 1104, 1117 (6th Cir. 1988), cert. denied, 110 S. Ct. 732 (1990). Both of those cases make clear that a theory-of-defense instruction need be given only where the asserted defense has "some foundation" (*Escobar De Bright*, 742 F.2d at 1201) or "finds some support" (*Duncan*, 850 F.2d at 1117) in the evidence; neither approach would have required petitioners' instruction on this record.

verdict on any interpretation of the tapes by government witnesses or on any government-prepared transcripts." Pet. App. 80a. Moreover, in light of the prominence given by the defense to the voice-identification issue, the court of appeals correctly concluded that "a jury receiving the court's general instructions on witness credibility, the government's burden of proof, and the limited purpose of the transcripts would understand that [the agent's] testimony was to be scrutinized with care." *Id.* at 81a.[11]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[11] The Angiulos cite *United States* v. *Duncan*, 850 F.2d at 1117-1118, for the proposition that a closing argument by defense counsel is no substitute for a jury instruction on the theory of the defense. Pet. 48-49. But the court of appeals did not hold that the defense closing argument made up for an inadequate jury charge; rather, it held that the jury instructions given by the court were sufficient to cover the essential points raised by petitioners' request, especially when viewed in light of the whole trial, including the closing arguments.

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